Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KAREN DEVINE,
Petitioner,

v.

STONE, LEYTON & GERSHMAN, P.C.,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When professionals elect to organize as a professional corporation, are they "employees" of the corporation under Title VII of the Civil Rights Act of 1964?

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PETITION FOR WRIT OF CERTIORARI

Karen Devine respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a- 8a) is reported at 100 F.3d 78. The opinion of the District Court (App., *infra*, 9a-12a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1996. App., *infra*, 1a. The Court of Appeals denied a timely petition for rehearing on December 30, 1996. App., *infra*, 13a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 2000e(f) (1994): "The term 'employee' means an individual employed by an employer . . . ."

2. 42 U.S.C. § 2000e(b) (1994): "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."

STATEMENT

Petitioner was fired by respondent, her employer, after complaining of sex discrimination and sexual harassment by her supervisors. She filed this lawsuit, alleging sex discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Missouri Human Rights Act. The District Court granted respondent's motion for sum-

mary judgment on the Title VII claim, on the ground that respondent was not an "employer" under Title VII because it had fewer than fifteen "employees." App., *infra*, 9a-12a. The District Court then dismissed the state law claim for lack of jurisdiction. A divided Court of Appeals affirmed. App., *infra*, 1a-8a.

1. Respondent is a law firm organized as a professional corporation under Missouri law. Petitioner began working for respondent as a paralegal in 1991. After enduring incidents of sexual harassment and sex discrimination, and after lodging repeated complaints with the firm, she was fired in 1994.

During 1993 and 1994, respondent employed eighteen people. Eight were attorneys, who were also shareholders in and directors of respondent. All eighteen were paid a bi-monthly salary by respondent. Respondent withheld money from the paychecks of all eighteen employees, including the attorneys, to pay for taxes and Social Security. Respondent provided all eighteen employees, including the attorneys, with vacation and medical leave, health and life insurance, and a pension plan. Under these benefit plans, respondent identified all eighteen, including the attorneys, as "employees."

2. On April 24, 1995, petitioner filed a two-count complaint in the United States District Court for the Eastern District of Missouri. Count I alleged a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Count II alleged a violation of the Missouri Human Rights Act.

Respondent moved for summary judgment on the Title VII claim, on the ground that respondent was not an "employer" as that term is defined in 42 U.S.C. § 2000e(b), because respondent had fewer than fifteen employees.

The District Court granted respondent's motion. The court reasoned that the eight attorneys in the firm, although employees

of respondent under the corporate law of Missouri, should nevertheless not be counted toward the fifteen-employee jurisdictional requirement of Title VII. The District Court adopted the view of the Seventh Circuit, under which the status of a person as an "employee" for purposes of Title VII is determined by examining "the economic realities of the employment situation." App., *infra*, 11a, citing *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177, 1178 (CA7 1984). The District Court concluded that because the eight attorneys played a "role . . . analogous to that of partners" in a partnership, they were not "employees" within the meaning of Title VII. App., *infra*, 12a. The court accordingly subtracted the eight attorneys from respondent's eighteen-person payroll, and determined that respondent employed fewer than fifteen people, and was thus not an "employer" under Title VII. *Id.*

In reaching this holding, the District Court rejected the contrary "bright line rule adopted by the Second Circuit," App., *infra*, 11a n.1, under which "the use of the corporate form precludes any examination designed to determine whether the entity is in fact a partnership." *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793, 798 (CA2 1986). The District Court preferred "not to base its determination of whether an individual is an 'employee' for purposes of Title VII purely on form rather than substance." App., *infra*, 11a n.1.

The District Court then dismissed petitioner's state law claim for lack of jurisdiction.

3. A divided Court of Appeals affirmed. The majority began by recognizing that "[c]ourts have taken two approaches in resolving the question of whether shareholders and directors of professional corporations are employees under federal antidiscrimination law." Under the Second Circuit's approach, the majority acknowledged, "the type of organization is decisive, and individuals working for a professional corporation are

considered employees." Under the contrary approach of the Seventh and Eleventh Circuits, the majority explained, a court is to examine "the actual circumstances to determine whether an individual functions like a partner. Individuals acting like partners will not be classified as employees because partners own and manage a firm." App., *infra*, 3a.

The majority held that the latter approach was "better reasoned." App., *infra*, 5a. It accordingly reviewed the "uncontroverted evidence" submitted to the District Court indicating that the firm's eight attorneys, as shareholders and directors, "participated in all management decisions and set firm policy." The majority thus concluded that summary judgment had been properly granted. App., *infra*, 7a.

Judge Heaney dissented. He explained that he would have followed the Second Circuit's approach rather than that of the Seventh and Eleventh Circuits. "Having made the election to incorporate," he reasoned, the attorneys employed by respondent "should not now be heard to say that their corporation is 'essentially a [legal] partnership among co-equal [attorneys].'" App., *infra*, 8a, quoting *Hyland*, 794 F.2d, at 798. In Judge Heaney's view, "this interpretation is consistent with the broad, remedial purpose of this anti-discrimination statute." App., *infra*, 8a.

The Court of Appeals denied a petition for rehearing and a suggestion for rehearing en banc. Chief Judge Arnold and Judge McMillian would have granted the suggestion for rehearing en banc. App., *infra*, 13a.

REASONS FOR GRANTING THE PETITION

With this case, the Eighth Circuit has added to a decade-old conflict among the Courts of Appeals over the application of the federal antidiscrimination statutes to professional corporations. The issue is one that recurs with some frequency. It is squarely presented in this case: both sides agree that respondent falls within the coverage of Title VII only if the attorneys employed by respondent are counted as "employees." The decision below, moreover, is difficult to reconcile with this Court's recent decision in *Walters v. Metropolitan Educational Enters., Inc.*, 65 U.S.L.W. 4059 (Jan. 14, 1997).

1. Title VII applies only to firms with "fifteen or more employees." 42 U.S.C. § 2000e(b). The Courts of Appeals have developed two inconsistent methods for determining whether a person employed by a professional corporation should be treated as an "employee" of the corporation.

The Second Circuit respects the form of business enterprise chosen by the defendant. *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1537 (CA2 1996); *Hyland v. New Haven Radiology Assocs., P.C.*, 794 F.2d 793, 798 (CA2 1986).[1] "The fact that certain modern partnerships and corporations are practically indistinguishable in structure and operation," the Second Circuit has explained, "is no reason for ignoring a form of business organization freely chosen and established." *Hyland*, 794 F.2d,

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[1] Although these cases arose under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., the ADEA "defines 'employer' [and 'employee'] in precisely the way Title VII does." *Walters v. Metropolitan Educational Enters., Inc.*, 65 U.S.L.W. 4059, 4060 (Jan. 14, 1997). The ADEA defines "employee" as "an individual employed by an employer . . . ." 29 U.S.C. § 630(f). The ADEA defines "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees . . . ." 29 U.S.C. § 630(b). As the Courts of Appeals have recognized, the question presented in this case is identical under Title VII and the ADEA. *Hyland*, 794 F.2d, at 797-98; *Devine*, App., *infra*, 4a.

at 798. In many areas of law — from tax to employee benefits to tort liability — firms are treated differently according to the form of enterprise they have adopted, even pairs of firms whose underlying economic realities are identical. *Id.* Where professionals are employed by the corporation in which they are also shareholders and directors, therefore, the Second Circuit treats them as "employees" for purposes of the antidiscrimination laws, regardless of the nature of their duties. Such a rule, the Second Circuit has observed, avoids the difficult fact-specific determination that would be necessary in many cases to decide whether a firm was subject to the antidiscrimination laws. *Johnson & Higgins*, 91 F.3d, at 1538; *Hyland*, 794 F.2d, at 798.

The Seventh, Eighth, and Eleventh Circuits, on the other hand, "reject the exaltation of form over substance that resides in reliance on a label ('corporation') applied to the entity as in *Hyland*." *Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398, 1400 (CA11 1991); *see EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177, 1178 (CA7 1984) (looking to "the economic realities of the employment relationship"); *Zimmerman v. North American Signal Co.*, 704 F.2d 347, 352 (CA7 1983) (looking to actual duties of people alleged to be employees); *Devine v. Stone, Leyton & Gershman, P.C.*, App., *infra*, 4a (CA8 1996) (looking to "the substance of the employment relationship"). *See also EEOC v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068, 1070 (CA6), cert. denied, 464 U.S. 819 (1983) (looking to actual duties of workers). Where an individual employed by a professional corporation exercises a managerial role, these courts refuse to treat the individual as an "employee" for purposes of the federal antidiscrimination laws. As the court below put it, "[i]n deciding whether the shareholder-directors are employees or employers, we look to the extent to which they manage and own the business. If the shareholder-directors manage and own SL&G, they should not be counted as employees." App., *infra*, 5a.

2. The question of how to determine whether a shareholder, director, or officer of a small corporation is also an "employee" of that corporation for purposes of the federal antidiscrimination statutes is one that recurs with some frequency.

In some cases, courts have joined the Second Circuit in respecting the corporate form. *See, e.g., Johnson v. Cooper, Deans & Cargill, P.A.*, 884 F. Supp. 43, 45 (D.N.H. 1994); *Gorman v. North Pittsburgh Oral Surgery Assocs., Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987).

In other cases, courts have joined the Seventh, Eighth, and Eleventh Circuits in looking to the "economic realities" of the employment relationship. *See, e.g., Goudeau v. Dental Health Servs., Inc.*, 901 F. Supp. 1139, 1142-43 (M.D. La. 1995); *Norman v. Levy*, 767 F. Supp. 1441, 1444-45 (N.D. Ill. 1991); *EEOC v. Pettegrove Truck Service, Inc.*, 716 F. Supp. 1430, 1433 (S.D. Fla. 1989); *Jones v. Baskin, Flaherty, Elliot & Mannino, P.C.*, 670 F. Supp. 597, 600-01 (W.D. Pa. 1987), aff'd mem., 897 F.2d 522 (CA3), cert. denied, 498 U.S. 811 (1990).

3. The decision below stands in considerable tension with *Walters v. Metropolitan Educational Enters., Inc.*, 65 U.S.L.W. 4059 (Jan. 14, 1997). Although the precise issue decided in *Walters* — how part-time workers should be counted toward Title VII's fifteen-employee threshold — is not present in this case, the Court's opinion made clear that in enacting Title VII Congress did not intend the threshold to require difficult fact-specific determinations in large classes of cases. The "economic realities" test adopted below by the Eighth Circuit, like the method of counting part-time workers proffered by the employer in *Walters*, "would turn the cover age determination into an incredibly complex and expensive factual inquiry." *Id.*, at 4062. In each case, a court would need to examine the actual duties of each worker simply to determine whether the firm is covered by Title VII in the first place. As in *Walters*, such a rule

"is so improbable and so impossible to administer . . . that Congress should be thought to have prescribed it only if the language could bear no other meaning." *Id.*, at 4061.

The alternative, as the Second Circuit has pointed out, is to respect the defendant's choice of the corporate form, and to treat all employees of the corporation as employees for purposes of Title VII. This approach is easy to administer, and is consistent with the statutory definition of "employee," which is nothing more than "an individual employed by an employer." 42 U.S.C. § 2000e(f). The background principles of corporate law are clear: the corporation is the employer, and the individuals who work for the corporation are its employees. These principles were equally clear when Congress enacted Title VII.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-1548

Karen Devine,
Plaintiff/Appellant,

v..

Stone, Leyton & Gershman, P.C.,
Defendant/Appellee.

September 11, 1996, Submitted
November 13, 1996, Filed

Before BEAM, HEANEY, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Karen Devine appeals from a judgment dismissing her claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et. seq., and the Missouri Human Rights Act, Mo. Rev. Stat. §§ 213.010 et. seq. Devine alleged that she was fired from her job at Stone, Leyton & Gershman, P.C. (SL&G) because she had complained of sexual harassment, and alternatively, because of her sex. The district court[1] granted SL&G's motion for summary judgment on the Title VII claim because it found that SL&G was not an "employer" under the statute, and dismissed the supplemental state law claim for lack of jurisdiction. We affirm.

Karen Devine alleges that she was sexually harassed and discriminated against during the three years she worked as a paralegal at SL&G. She states that she first brought the problem

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[1] The Honorable Carol E. Jackson, United States District Judge for the Eastern District of Missouri.

to the attention of attorney Steven Leyton in June 1992. She claims the harassment continued, and that in October 1993 she made a formal complaint to Jeffrey Gershman and told him she was prepared to file a claim with the EEOC. Devine was fired in May 1994.

In June 1992, at the time Devine said that she first spoke to Leyton about harassment, SL&G was organized as a partnership, but it changed its form in January 1993 and became a professional corporation.[2] The attorneys who had been partners became shareholders and directors of the professional corporation. After the change in form, other attorneys became shareholders and directors. The total number of employees at SL&G during 1993 and 1994 is disputed by the parties. Devine asserts that there were eighteen employees in 1994 when she was fired, eight of whom were attorneys. SL&G states that it had no more than twelve employees.

In her complaint Devine alleged that SL&G was an "employer" under Title VII and Missouri law. SL&G moved for summary judgment, claiming it did not meet the federal statutory definition of employer because it did not have fifteen employees since the attorney shareholders and directors did not count as such. There is no dispute that jurisdiction under Title VII depends on whether or not some or all of the attorney shareholder-directors were employees.

The plain language of the statute does not provide much guidance in determining whether any or all of SL&G's shareholder-directors are employees. "Employee" is defined as "an individual employed by an employer. . . ." 42 U.S.C. § 2000e(f). "Employer" is defined as a "person engaged in an

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[2] The partnership was called Stone, Leyton, Carey & Zatlin. Although Carey and Zatlin remained after the reorganization, their names were not used in the corporate title.

industry affecting commerce who has fifteen or more employees. . . ." 42 U.S.C. § 2000e(b).

Devine contends that the attorneys were employees in 1994 because they worked for a professional corporation. She points out that SL&G chose to switch from a partnership to a corporation. According to her, SL&G obtained tax and employee benefits by switching to the corporate form and it should have to accept other consequences of that type of entity. She argues Title VII is remedial in nature and should be liberally construed to further its objectives and that judicial economy favors adoption of a per se rule making every individual in a professional corporation an "employee."

SL&G argues that examination of the economic realities of its employment arrangement shows that the shareholder-directors were not employees. Even though it was a professional corporation, it functioned like a partnership and the shareholder-directors acted like partners. Partners are not employees it says, so the attorney shareholders should be considered similarly.

Courts have taken two approaches in resolving the question of whether shareholders and directors of professional corporations are employees under federal antidiscrimination law. Under one approach the type of organization is decisive, and individuals working for a professional corporation are considered employees. *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996); *Hyland v. New Haven Radiology Assocs., P.C.*, 794 F.2d 793 (2d Cir. 1986); *Johnson v. Cooper, Deans & Cargill, P.A.*, 884 F. Supp. 43 (D.N.H. 1994). The other approach examines the actual circumstances to determine whether an individual functions like a partner. Individuals acting like partners will not be classified as employees because partners own and manage a firm. *Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398 (11th Cir. 1991); *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984).

The words "employer" and "employee" should be given their established meaning. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992) (holding that where the statute does not helpfully define the term "employee," courts should apply its established meaning); *Graves v. Women's Professional Rodeo Ass'n, Inc.*, 907 F.2d 71, 73 (8th Cir. 1990). Cases interpret ing the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et. seq., can also be useful in Title VII cases since the relevant definitions are nearly identical and the underlying purpose is similar.[3] *See McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 130 L. Ed. 2d 852, 115 S. Ct. 879, 884 (1995); *Lenhardt v. Basic Inst. of Tech nology, Inc.*, 55 F.3d 377, 380 (8th Cir. 1995); *Hyland*, 794 F.2d at 796.

This court has indicated that the form of the organiza tion does not control whether an individual is an employee under the ADEA. *EEOC v. Peat, Marwick, Mitchell & Co.*, 775 F.2d 928 (8th Cir. 1985). The firm in *Peat Marwick* was organized as a partnership, but the EEOC argued that at least some of the 1300 partners were employees under the statute. The EEOC was permitted to investigate by subpoena whether the partners were in fact employees. Examination of the circumstances would not have been necessary if the form of the organization were controlling. As *Peat Marwick* suggests, employment relationships vary greatly and often defy easy categorization. A rigid per se rule that stresses organizational form over substance might be easier to apply, but it also might undermine the statutory purposes.

The better reasoned cases hold that the substance of the employment relationship determines whether an individual is an

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[3] The ADEA defines "employee" as "an individual employed by any employer. . . ." 29 U.S.C. § 630(f). "Employer" is defined as "a person engaged in an industry affecting commerce who has twenty or more employees. . . ." 29 U.S.C. § 630(b).

employee under Title VII. *E.g.*, *Fountain*, 925 F.2d at 1400-01; *Calderon v. Martin County*, 639 F.2d 271, 273 (5th Cir. 1981); *see also Peat Marwick*, 775 F.2d at 930 (invol ving ADEA); *McGraw v. Warren County Oil Co.*, 32 Fair Empl. Prac. Cas. (BNA) 1798 (S.D. Iowa 1982), *aff'd*, 707 F.2d 990, 991 (8th Cir. 1983) (per curiam) (involving ADEA and affirmed "on the basis of the district court's well-reasoned opinion"). The actual duties and role of the individual govern the resolution of the issue. An employer may not avoid Title VII by affixing a label to a person that does not capture the substance of the employment relationship. *See Hishon v. King & Spalding*, 467 U.S. 69, 80 n.2, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984) (Powell, J., concurring); *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 352 n.4 (7th Cir. 1983).

In deciding whether the shareholder-directors are employees or employers, we look to the extent to which they manage and own the business. If the shareholder-directors manage and own SL&G, they should not be counted as employees.[4] *See Fountain*, 925 F.2d at 1401; *Burke v. Friedman*, 556 F.2d 867, 869 (7th Cir. 1977). All relevant factors must be examined; any one may not be decisive in deciding whether an individual is an employee. *See Darden*, 503 U.S. at 324; *Wilde v. County of Kandiyohi*, 15 F.3d 103, 106 (8th Cir. 1994). A factor important to consider in evaluating the degree of management and control is the ability to participate in setting firm policy. Participation rights need not be equal, but the test is whether the shareholder-directors have a meaningful voice in decision-making. *See Strother v. Southern Cal. Permanente Medical Group*, 79 F.3d 859, 867-68 (9th Cir.

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[4] Cases that distinguish employees from independent contractors are not directly applicable here. *E.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992). Those cases use agency principles to determine whether an individual is part of the enterprise. The shareholder-directors are clearly part of SL&G. The question is whether they manage and own the firm.

1996). Indicia of ownership include such things as contributions to firm capital, liability for debts, and compensation based on profits. *See Commissioner v. Tower*, 327 U.S. 280, 286, 90 L. Ed. 670, 66 S. Ct. 532 (1946) (noting that a partnership is generally created when there is a "community of interest in the profits and losses"); *Wheeler*, 825 F.2d 257 at 274; *Burke*, 556 F.2d at 869.

The record presented to the district court in this case was limited. Devine submitted her affidavit and a one page exhibit. SL&G submitted an affidavit of Leyton. Neither side directly contradicted the evidence of the other. According to Devine's affidavit, SL&G controlled how the shareholder-directors performed their duties and required that their work be done at its office; paid them a bi-monthly salary; provided insurance, pensions, and health benefits; and withheld taxes. According to Leyton's affidavit, the shareholder-directors participated in all management decisions including hiring employees. admitting new shareholders, setting billing rates, and supervising the firm's work, made capital contributions to the firm; guaranteed loans and leases; and were compensated on the basis of the firm's profits.

We review appeals of summary judgment de novo. *Maitland v. University of Minn.*, 43 F.3d 357, 360 (8th Cir. 1994). Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The non-moving party must make "a sufficient showing on [all] essential elements of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The existence of a "scintilla of evidence" in favor of the non-moving party is not enough to create a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Devine did not meet her burden to present sufficient evidence that SL&G was an employer under Title VII. She had the burden to prove federal jurisdiction. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990). In her affidavit, Devine stated that SL&G controls the work of the attorneys. This does not describe how the business was actually run, however. She also indicated that the shareholder-directors were paid a bi-monthly salary, but this is not enough to make them employees, particularly since there was unrebutted evidence that their compensation was based on the firm's profits. *See Graves v. Women's Professional Rodeo, Ass'n, Inc.*, 907 F.2d 71, 73 (8th Cir. 1990). Furthermore, there was uncontroverted evidence that the shareholder-directors participated in all management decisions and set firm policy, as well as evidence showing indicia of ownership such as contributions to firm capital and responsibility for firm debts. Devine did not refute this evidence.

Since Devine did not make a sufficient showing that the shareholder-directors were employees and that the firm therefore was an employer under Title VII, summary judgment was proper. The dismissal then of the supplemental state law claim was not an abuse of discretion. Accordingly, the judgment is affirmed.

HEANEY, Circuit Judge, dissenting.

I respectfully dissent. I agree with the Second Circuit that professionals who elect to incorporate are "employees" for the purpose of Title VII. *See Hyland v. New Haven Radi ology Assocs., P.C.*, 794 F.2d 793, 798 (2d Cir. 1986). Read ing the statute either literally or broadly, the shareholders of a professional corporation fall under the general statutory definition of employee: they are employed by the corporation. The corporation pays them a bi-monthly salary, withholds taxes from them, and provides them with insurance, pension, and health benefits.

The corporate structure also offers to the shareholders significant tax advantages and employee benefits. "Having made the election to incorporate, they should not now be heard to say that their corporation is 'essentially a [legal] partnership among co-equal [attorneys].'" *Id.* Assu ming that all of the attorneys at SL&G actively engage in the practice of law, they should be counted as "employees" and SL&G should be considered an "employer" under 42 U.S.C. § 2000e(b). Although this interpretation of Title VII exposes professional corporations to potential liability, it also offers to all of the shareholders, particularly the less senior ones, protection from discriminatory conduct. In my view, this interpretation is consistent with the broad, remedial purpose of this anti-discrimination statute. Thus, I would reverse the district court and allow Devine to go forward with her discrimination claim.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No: 4:95-CV-718 (CEJ)

KAREN DEVINE,
Plaintiff,

v.

STONE, LEYTON & GERSHMAN, P.C.,
Defendant.

MEMORANDUM

This matter is before the Court on defendant's motion for summary judgment on Count I and to dismiss Count II. *See* Fed. R. Civ. P. 56 and 12(b). Plaintiff has filed a memo randum opposing the motion.

On April 24, 1995 plaintiff filed a two-count complaint under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.010 *et seq.*, alleging sexual discrimin ation and retaliation.

Plaintiff began working for defendant, a law firm, as a paralegal in September 1991. At that time, defendant was operating as a partnership. Plaintiff alleges that she began complaining to the firm in 1992 about sexual harassment and discrimination. On January 1, 1993, the defendant began operating as a Missouri professional corporation, at which time, all of the partners of the firm became shareholders and directors. In October 1993, plaintiff made a formal, written complaint to the firm stating she was prepared to file a charge of discrimination with the Equal Employment Opportunity Commission. Plaintiff was terminated on May 20, 1994.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment the court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987). The moving party bears the burden of showing both the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986); Fed. R. Civ. P. 56(c). Once the moving party has met its burden, the non-moving party may not rest on the allegations of his pleadings but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986).

To be an "employer" for purposes of Title VII, the defendant must have 15 or more employees. 42 U.S.C. § 2000e(b). Excluding the partners and shareholders/directors, the defendant has never employed 15 or more employees. Thus, plaintiff can bring a claim against defendant under Title VII only if defendant's shareholders/directors are considered "employees" for purposes of 42 U.S.C. § 2000e(b).

Because of their unique status as owners and managers, it is generally accepted that partners are not employees for the

purposes of anti-discrimination laws. *Hyland v. New Haven Radiology Assoc., P.C.*, 794 F.2d 793, 797 (2nd Cir. 1986); *Hishon v. King & Spalding*, 467 U.S. 69, 79 (1984); *E.E.O.C. v. Dowd & Dowd, LTD.*, 736 F.2d 1177, 1178 (7th Cir. 1984). However, Title VII cannot be evaded merely by labeling employees "partners." *Hishon*, 467 U.S. 79; *Hyland*, 794 F.2d at 797; *Maher v. Price Waterhouse*, 1985 WL 9500, *1 (E.D. Mo. 1985). In determining whether an individual is an employee for purposes of Title VII, courts consider the economic realities of the employment situation. *Dowd*, 736 F.2d at 1178.

Defendant argues that because the shareholders/ directors in its professional corporation are in economic reality the equivalent of partners they are not "employees" for purposes of Title VII. Further, defendant argues that the change from a general partnership to a professional corporation did not automatically convert the partners into employees.[1]

In the present case, defendant's shareholders/directors have continued to perform as they did as partners. The shareholders/ directors have continued to exclusively own, manage and control the firm in the same manner as when it was a partnership. The shareholders/directors make capital contributions; guarantee repayment of loans; allocate compensation among the shareholders based upon the firm's profits; allocate and supervise the firm's legal work; and participate in all management decisions. Based on these economic realities, it is clear that the role of defendant's shareholders/directors is analogous to that of partners. Therefore, the shareholders/ directors are not "employees" for purposes of 42 U.S.C. § 2000e(b). *See Dowd*, 736 F.2d at

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[1] Plaintiff urges the Court to use the bright line rule adopted by the Second Circuit in *Hyland*. That case held that for purposes of the ADEA, a professional corporation could not assert that in economic reality it was a partnership. *Hyland*, 794 F.2d at 798. The Court, however, chooses not to base its determination of whether an individual is an "employee" for purposes of Title VII purely on form rather than substance.

1178 (holding that the shareholders in a professional corporation engaged in the practice of law were not "employees" for purposes of Title VII). Thus, defendant is not an "employer" because it does not have the requisite 15 or more employees. 42 U.S.C. § 2000e(b).

Defendant also argues that the Court should decline to exercise supplemental jurisdiction over plaintiff's state law claim in Count II. According to 28 U.S.C. § 1367(c)(3), a court may decline to exercise supplemental jurisdiction if the court has dismissed all claims over which it has original jurisdiction. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Accordingly,

Defendant's motion for summary judgment on Court I and to dismiss Count II will be granted.

CAROL E. JACKSON
UNITED STATES
DISTRICT JUDGE

Dated this 18th day of January 1996.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-1548EMSL

Karen Devine,
Appellant,

v.

Stone, Leyton & Gershman, P.C.
Appellee.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Chief Judge Richard S. Arnold and Judge McMillian would grant the suggestion. The petition for rehearing by the panel is also denied.

December 30, 1996